No. 10,380

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

CARSON AND TAHOE LUMBER AND FLUMING CO. (a corporation),

Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

PETITIONER'S REPLY BRIEF.

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(1) PARTIES ARE IN SUBSTANTIAL ACCORD WITH REGARD TO THE PRINCIPLES OF LAW.

The parties hereto appear to be in substantial accord with regard to the basic principles of law involved in this appeal. Respondent agrees that this Court has jurisdiction to review the case to determine whether the findings and decision of The Tax Court are supported by substantial evidence and may reverse the decision if it is determined that it is not supported by substantial evidence. Likewise petitioner agrees that if there is substantial evidence to support the decision of The Tax Court a Circuit Court will not reverse the decision merely because it would have reached a different conclusion from the evidence.

While respondent expressly agrees with the above principles of law which have been established by a long line of decisions (see Petitioner's Opening Brief, p. 12), respondent's argument in support of the decision herein seems to be based upon the theory that if there is any evidence of facts which have a bearing upon value the finding of The Tax Court must be accepted without regard to whether there is any basis in the evidence upon which the specific value found can be supported.

Petitioner submits that the above stated theory is erroneous and is contrary to the rule established by decisions of this Court and other Courts of Appeal. *A finding of value by The Tax Court must be based upon the evidence presented to it and must be supported by substantial evidence.* Respondent states (Respondent's Brief, p. 19): "The Board's finding of value in this case represents its best estimate of the March 1, 1913, value of the property involved, based on all the facts before it".

The quoted statement could be made of any case. It is assumed without question, that in every case, the trial judge makes an honest and conscientious effort to determine the case from the evidence and that in a valuation case the value found is the trial judge's best estimate based upon the facts before him. If that were all that were necessary to support a decision, no decision based upon a finding of value could be reversed without a showing of bad faith. Petitioner submits that it is not sufficient that the value found represents the best estimate of the

trial judge. The value found must also be supported by substantial evidence.

While it is necessarily true that a finding of value must be, to a certain extent, an estimate or guess, it is also true that such estimate or guess must be based upon the evidence and must be a reasonable estimate supported by substantial evidence.

Andrews v. Commissioner (2 Cir. 1943), 135 F(2d) 314;

Tex-Penn Oil Co. v. Commissioner (3 Cir. 1936) 83 F(2d) 518.

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(2) RESPONDENT POINTS TO NO EVIDENCE WHICH SUPPORTS THE VALUE FOUND BY TAX COURT. THERE IS NO SUCH EVIDENCE.

In its petition for review (R. 39) and in its opening brief petitioner clearly and definitely challenged the value found by The Tax Court on the ground that it was not supported by substantial evidence and was contrary to the only competent evidence of value in the record. *It is significant that in his brief respondent points to no evidence which supports the value found by The Tax Court and suggests no theory or basis upon which the value found could be determined from the evidence in the record.* The answer is that there is no such evidence.

Respondent limits his argument to criticism of the evidence which supports the value contended for by petitioner and to the statement that the value found was The Tax Court's best estimate of value from the

evidence. Even if it should be determined that the evidence does not support the value claimed by petitioner, such failure of evidence does not authorize The Tax Court to arbitrarily fix a value or to find a value not established by the evidence.

Respondent's statement of facts is a restatement of the portion of the evidence set forth by The Tax Court as its findings of fact. Respondent, like The Tax Court, has set forth as facts the evidence which made the property appear undesirable and has ignored much of the favorable evidence given by more competent witnesses.

Respondent repeats the finding of The Tax Court that the property in question was inaccessible, because of poor roads, and was less desirable than other land around Lake Tahoe because of unfavorable climatic conditions. This evidence was given by witnesses in the Forestry Service, most of whom did not visit the land until many years after 1913. The witnesses who were best acquainted with the land in 1913 testified that the road was not considered bad and was used by automobiles long prior to 1913 (R. 218, 219). The road was as good as the road from Truckee to Tahoe City (R. 218). There was no evidence that the road was only suitable for horsedrawn vehicles. Mr. Comstock also testified that the Nevada side of the Lake was just as desirable as the California side (R. 215). But even if the testimony that the land in question was not as desirable or as accessible as the land on the California side is accepted, and the contrary evidence of other witnesses is disregarded, these facts do not

establish a dollar value for the land or support the value found by The Tax Court.

Respondent refers to the finding of The Tax Court that waterfront property on the California side of Lake Tahoe near Tahoe City was selling in 1916 for from "five to ten times as much as that on the east side of the Lake" (R. 28), Neither respondent nor The Tax Court mention the fact that the witness who so testified also testified that some of the California land referred to "couldn't have been acquired * * * for less than five hundred to a thousand dollars an acre" (R. 344-345). Even on the basis of that testimony the Nevada land was worth fifty to one hundred dollars an acre. That statement certainly does not support the finding of The Tax Court of an average value of $6.70 per acre.

Respondent also refers to the probate appraisals of land in the vicinity, to appraisals for property tax purposes, to sales of other land and to statements regarding value in petitioner's tax returns as being evidence of value. As stated in petitioner's opening brief, there is nothing in the record to show by whom one of the probate appraisals was made and the other was made in 1921 by a man who had no qualifications as an expert (See Petitioner's Opening Brief, p. 30). The same is true of the property tax appraisals. Such appraisals are entitled to no weight unless it appears that the persons who made them were qualified. *Carnrick v. Commissioner,* 21 B.T.A. 12; *Mertens, Law of Federal Income Taxation,* Vol. 10, p. 452. The sales of other property were not shown to be comparable

and the statements in the returns were declared by the persons responsible therefor to be arbitrary statements having no relation to March 1, 1913 value of the land (R. 132-133, 234). Such evidence and statements cannot be considered substantial evidence. Neither does that evidence have any apparent relation to the value found by The Tax Court.

Respondent also questions the testimony of Mr. Bliss and Mr. Comstock. Weaknesses, if any, in the testimony of Bliss and Comstock do not establish a value other than that to which they testified.

Respondent makes no attempt to show wherein the evidence referred to by him supports the value found by The Tax Court. He merely states that it was evidence which was entitled to consideration in determining the value of the property.

Respondent fails to distinguish between direct evidence of value and evidence of secondary facts which have a bearing upon value. Certainly the condition of the roads, the accessibility of the property, the climatic conditions and the availability for recreational purposes have a bearing on value but those facts alone furnish no basis upon which a person not familiar with the land and values in the vicinity can place a dollar value on particular property.

There was a great deal of evidence of facts which might have a bearing on value but there was no evidence of the value of the land in question except the appraisal and testimony of Mr. Bliss and the corroborative testimony of Mr. Comstock. None of the other witnesses expressed an opinion with regard to the value of the land in question as of 1913 or any

other date. There was evidence of sales of property in the vicinity but there was no evidence from which a comparison could be made between the properties sold and the 11,187 acres of land in question. Also, the sales prices varied over such a wide range that they furnish no basis for determination of an average value.

The issue in this case was not the comparative merits of lands in general around Lake Tahoe but the amount of the fair market value on March 1, 1913 of the particular 11,187 acres of land here involved.

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(3) THERE IS NO EVIDENCE IN THE RECORD TO SUPPORT ANY BASIS FROM WHICH A $75,000 VALUATION COULD BE COMPUTED.

The 11,187 acres of land in question included many different types of land with widely varying values. There was no evidence in the record from which it could be determined how much of the land should be placed in each classification. Such evidence was not necessary in connection with the appraisal and testimony of value by Mr. Bliss and the testimony of value by Mr. Comstock for they were thoroughly familiar with the land and took all of the facts into consideration in fixing the value placed upon the land. No one not familiar with the land could have made a reasonable determination of value without knowing at least approximately the number of acres in each classification. As the Judge of the Tax Court had no such knowledge it is submitted that his determination of value for the 11,187 acres must necessarily have been

without consideration of the various types of property included and, therefore, wholly arbitrary.

Petitioner's contention in this regard is not based upon the fact that the Tax Court found a lump sum value, as respondent suggests, but rather that no one could make a reasonable determination of the value of 11,187 acres of land of various classifications with different values without knowing how many acres were to be included in each classification. The fact that the Tax Court made no reference to the values of different classifications of land but merely stated that the value of the land on March 1, 1913 was $75,000, and the fact that the Tax Court had no knowledge of the character of the land involved indicates quite clearly that the $75,000 was merely an arbitrary guess without foundation or support in the evidence before the Court.

While a trial Court must be allowed considerable leeway in determining value and the Court may weigh the evidence and make allowance for facts which may affect the value of the property involved, a finding of value must be based upon and supported by substantial evidence. Where the trial judge has no independent knowledge of the property and values, a finding of value which has no relation to the evidence cannot be justified on the ground that it represents the trial Court's best estimate. The Court's estimate or determination of value must be within the reasonable limits established by the evidence.

Suppose that in the present case respondent had introduced no evidence and that the only evidence before the Court was the testimony of Mr. Bliss cor-

roborated by Mr. Comstock that the fair market value of the property in 1913 was at least $155,014.00. Certainly under those circumstances a finding of a value of $75,000.00 would be arbitrary and unreasonable and without support in the evidence.

The situation in the present case is no different in substance. Respondent introduced considerable evidence but offered nothing which furnished a basis for determining a dollar value for the property here involved. There was no evidence from which the land involved could be classified so that a value could be reached on the basis of the sales of other land. None of the evidence introduced by respondent pertained to or furnished a basis for determining the March 1, 1913 value of the 11,187 acres of land here involved.

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(4) THE TAX COURT CANNOT IGNORE THE ONLY COMPETENT EVIDENCE. THE EVIDENCE NOT ONLY DOES NOT SUPPORT THE $75,000 VALUATION FOUND BY THE TAX COURT BUT DOES SUPPORT THE VALUATION CLAIMED BY PETITIONER.

The valuation claimed by petitioner is based primarily upon the appraisal made by Mr. Bliss in 1912. As stated in petitioner's opening brief, the only evidence of the March 1, 1913 value of the 11,187 acres of land here involved was the testimony and the 1912 appraisal of Mr. Bliss which was corroborated by Mr. Comstock. Both of these witnesses were thoroughly familiar with the land, the conditions which existed in 1913, and with sales of other properties. In determining the value which he placed on the land in 1912 Mr. Bliss took into consideration the various ele-

ments which have a bearing upon the value of land of that type. (R. 127-128.) A contemporary appraisal made on or about the basic valuation date by a person qualified and competent to make an appraisal is entitled to great weight and should not be ignored. *Empire Machine Co. v. Commissioner,* 16 B.T.A. 1099, 1110.

In its Findings of Fact (R. 30) The Tax Court listed the sales in the vicinity from 1903 to 1923. Examination of these sales discloses that the appraisal of Mr. Bliss was none too high and also indicates that the value found by The Tax Court is much too low.

Those sales of land which were *part of the very land appraised by Mr. Bliss,* are listed below with additional columns showing the sales price, the value at which the property was appraised by Mr. Bliss in 1912 as shown by petitioner's Exhibit 15 (R. 100-105) and the percentage of the sales price to the appraisal value:

ɔndee	Date of Sale	Acres	Location	Price per Acre	Sales Price	Appraised Value	Percent of sales price to appraised value
			1¾ miles from shore				
etert	1913	640	(good timber land)	$ 6.00	$ 3,840.00	$ 3,840.00	100%
igot	1917	80	Unknown	12.50	1,000.00	1,000.00	100%
ɔwgill	1919	40	½ mile from shore	6.00	240.00	240.00	100%
e Vaux	1920	40	¾ mile from shore	10.00	400.00	240.00	166.6%
ulstone	1920	1160	Unknown	4.28	4,965.00	5,800.00	85.6%
ulstone	1920	1634	Unknown	6.78	11,089.00	13,072.00	84.8%
ɔhmeidel	1921	4⅔	Shore front	764.59	3,563.00	3,563.00	100%
ulstone	1922	922	Unknown	5.75	5,301.50	5,993.00	88.4%
ardy	1922	37	Shore front	67.56	2,500.00	3,110.00	80.4%
ulstone	1923	416	Zephyr Cove				
			Part shore front	21.63	9,000.00	18,850.00	47.7%

The first sales were at 100% or more of the appraised value and it was not until 1920 that a sale was made at less than the value at which the land was appraised by Mr. Bliss. The record shows that the property sold to Mr. Fulstone in 1923 at 47.75% of the appraised value was made under the pressure of need of cash (R. 112), and that the property was resold shortly thereafter by Mr. Fulstone for $18,000 or 95.4% of the appraised value (R. 164). Mr. Bliss also testified that he didn't think $9,000 was a fair price for that property (R. 164). Mr. Bliss testified that all of the sales to Mr. Fulstone were made under the pressure of need of money (R. 112).

The sales above listed at prices per acre even approximating the average per acre value of $6.70 determined by the Tax Court were considerable distance from the lakeshore. The properties, the location of which is stated above as "unknown", are shown by petitioner's Exhibit 15 (R. 100-105), to have included no shore frontage. It is clear from the record that the shore land had a considerably greater value than the back land.

The sales listed by The Tax Court which were of lands not included in the 1912 appraisal of Mr. Bliss were as follows:

Vendee	Date	No. of Acres	Location	Price per Acre
Joseph W. Hall	1903	8.58	Shore Front (Skunk Harbor)	$ 1.25
Joseph W. Hall	1903	25.15	Shore Front	1.25
Harry O. Comstock	1910	2	Shore front on south-eastern side of Lake on Calif.-Nev. border (beach)	500.00
Wm. McFaul	1911	160.00	Small part shore front (Marla Bay)	1.25
Harry O. Comstock (Vendor)	1915	2	Shore front on south-eastern side of Lake on Calif.-Nev. border (beach)	1,500.00
Eliz. M. Beatty (Vendor)	1921	153.00	Shore front (between Zephyr Cove and and Glenbrook)	26.14
Newhall	1922	290.67	Shorefront (between Skunk Harbor & Secret Harbor)	18.96

The sale listed by The Tax Court as being made to Wm. McFaul in 1911 at $1.25 per acre is believed to be in error. Mrs. Allerman testified that her father, Mr. McFaul, purchased property known as Round Mountain in 1911 for $200.00 (R. 268) but she did not know the acreage (R. 267). The 160 acres used by The Tax Court was the acreage of the Marley Ranch (R. 266). Twenty-three acres of land purchased by Mr. Hall in 1903 at $1.25 per acre were sold by him in 1925 at over $217.00 per acre (R. 253).

Petitioner submits that the above sales corroborate the soundness and the fairness of the appraisal made by Mr. Bliss in 1912. Said sales furnish no support whatever for the value found by The Tax Court.

It cannot be doubted that Mr. Bliss and Mr. Comstock were thoroughly familiar with the land in question and with land values in that vicinity. The testimony of these witnesses is the only evidence in the record with regard to the value of the 11,187 acres in question. It is respectfully submitted that The Tax Court erred in disregarding the value placed upon the land by these witnesses and finding a value which has no apparent relation to any evidence in the record and which appears to be a purely arbitrary figure.

Andrews v. Commissioner (2 Cir. 1943) 135 F (2d) 314.

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(5) THERE IS NO BASIS IN THE RECORD FOR A FINDING OF A VALUE LESS THAN THE BLISS APPRAISAL. THE BURDEN OF PROOF WAS UPON THE RESPONDENT TO PROVE A DIFFERENT VALUE, AND SINCE HE FAILED IN MEETING THIS BURDEN THE TAX COURT SHOULD HAVE FOUND NO TAX DEFICIENCY.

While The Tax Court is not necessarily required to accept the value placed upon property by expert witnesses, where there is no other competent evidence of the value of the land involved and The Tax Court has no independent knowledge upon which to base a finding of value, the Court should either accept the opinion of the expert witnesses or refuse to find any value for failure of proof. In the present case The Tax Court did neither but found a value which is not supported by any evidence.

If The Tax Court was justified in disregarding the testimony of expert witnesses, it should have rendered a decision of no deficiency. In amending his answer to seek a greater deficiency respondent abandoned the determination in his original notice of deficiency and assumed the burden of proving that any deficiency in tax was due. Respondent clearly did not sustain the burden which he voluntarily assumed and he did not establish any basis upon which a deficiency in tax could be determined. If, however, respondent is entitled to the benefit of the presumption in favor of the determination in the deficiency notice, in spite of the fact that he expressly repudiated and abandoned his prior determination, there was no basis in the facts or evidence for the determination of a deficiency greater than that originally proposed by respondent.

Petitioner's contentions in this regard are applicable only if it is determined that the finding of value made by The Tax Court is not supported by substantial evidence. Of course, if the finding is supported by substantial evidence it is immaterial upon whom the burden of proof rested. But if, as petitioner contends, the value found is not supported by substantial evidence, the finding cannot be sustained on the basis of any presumption in favor of respondent's determination. The value found is far below the value determined by respondent in his deficiency notice (R. 11-15).

Ordinarily the taxpayer has the burden of proof and if he fails to establish a value The Tax Court refuses to make a finding of value and affirms the determination of the Commissioner. Here respondent re-

pudiated and abandoned his determination and assumed the burden of proof. The only evidence in the record of the March 1, 1913 value of the 11,187 acres establishes a value of $155,014.00. If this evidence was not acceptable The Tax Court should have refused to find a value and refused to determine any deficiency for failure of proof. In any event there was no basis whatsoever for the determination of an increased deficiency (see *Yellow Poplar Lumber Co. v. Commissioner,* 12 B.T.A. 1050).

CONCLUSION.

It is respectfully submitted that The Tax Court erred in determining any deficiency in this case and that in any event it erred in determining a deficiency greater than that originally proposed. It is respectfully submitted that the decision of The Tax Court herein should be reversed with instructions to enter a decision of no deficiency.

Dated, San Francisco, California,
September 25, 1943.

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